No. 83-1950

In The
Supreme Court of the United States
October Term, 1983

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MARY JEAN McALLISTER and
JUDITH E. KLINE, D.O.,

Petitioners,

vs.

GULF FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

—o—

Petition For Writ Of Certiorari From The District Court Of Appeal Of Florida For The Second District

—o—

RESPONDENT, GULF FEDERAL SAVINGS AND LOAN ASSOCIATION'S BRIEF IN OPPOSITION

—o—

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STATEMENT OF THE CASE

At the outset, Respondent would note that Petitioners cited to pages of the record below which are not reproduced in the Appendix as required by Supreme Court Rule 21. Respondent's brief, in accord with Supreme Court

Rule 34, is limited to matters found in the Appendix to Petitioners' Brief, citations to said Appendix are by page number denoted (A-—) or those reproduced in the Appendix hereto (App. 1).

Respondent is in substantial agreement with Petitioners' Statement of the Case, but would, pursuant to Supreme Court Rule 22, clarify the facts as follows.

Petitioners' suggestion that Respondent does not, as a matter of policy, perform a combined analysis of unmarried joint applicants is incorrect. The court below specifically found that Respondent, as a matter of policy, performs a combined analysis for unmarried co-applicants, even though it requests separate applications from them (A-3a, 4a, 5a). The court also found Respondent's failure to follow this policy on Petitioners' loan was the result of negligence rather than discrimination (A-4a, 9a); a finding in accord with that of the administrative agency investigating this cause (A-5a).

The court below also found Respondent's basis for denying Petitioners' application was the fact their income-to-debt ratio exceeded the present loan committee guidelines (A-4a, 6a, 9a). Petitioners' correct combined income-to-debt ratio of 47% was outside the loan committee's lending standards of 33% (A-4a, 9a) and there was no evidentiary showing that Petitioners would have been granted the loan if a combined loan analysis had been performed (A-9a).

While Respondent told Petitioner McAllister a combined analysis was not performed, the Court below did not find, as suggested by Petitioners on page 4 of their Brief,

that one of the co-applicants would have to qualify individually for the loan to be granted.

Respondent did have a "special category of loans" where, "under certain circumstances" a loan could be granted with an income-to-debt ratio in excess of 33% but less than 50%, but there was "no showing that Gulf Federal regularly made loans with an income-to-debt ratio above 33%" (A-8a, 9a). Loans in this category were not granted on a regular basis as implied on page 5 of Petitioners' Brief and Petitioners did not introduce extensive evidence as to the eligibility for loans in this category as suggested on the same page. To the contrary, the Court specifically held that Petitioners, ". . . (H)ave not presented any evidence to establish this criteria for loans above the 33%" and as a consequence, it was not known to the court if Petitioners "(W)ould qualify for a loan where the income-to-debt ratio was up to 50%" (A-9a). Thus, the Court could not find that Petitioners were otherwise qualified and entitled to a loan with an income-to-debt ratio under a combined analysis of 47% (A-9a).

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SUMMARY OF THE ARGUMENT

The Petition should be denied on both a factual and legal basis. On a factual basis because the court below found Respondent denied Petitioners' loan on their income-to-debt ratio rather than marital status; and on a legal basis because neither the question presented in the Petition is necessary to adjudication of cases under the Equal Credit Opportunity Act of 1974, 15 U.S.C. Sec. 1691,

et seq. (ECOA), nor is there a lack of binding Supreme Court precedent for inferior courts to follow in adjudicating cases under ECOA.

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REASONS FOR DENYING THE WRIT

A. Petitioners' reliance on Mt. Healthy City Board of Education v. Doyle is misplaced because the Court below did not find that an impermissible factor played a substantial part in the decision to deny Petitioners' loan.

The entire question presented to this Court is based upon the premise that Petitioners did, in fact, prove Respondent's denial of their loan was based upon an impermissible factor. This is contrary to the Order of the Circuit Court which specifically found denial was because the 33% income-to-debt ratio guidelines had been exceeded (A-4a).

Petitioners constantly point to the fact a combined loan analysis sheet was not prepared (as would have been done automatically for married co-applicants) but this fact, in and of itself, is not discriminatory because the court held that Respondent's policy was to perform such an analysis (A-4a, 5a) and its failure to do so in this case was predicated on negligence rather than intentional discrimination (A-9a).

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), the chief case relied upon by Petitioners, addresses the so-called dual motive case in which an

impermissible factor played a "substantial part" in the decision; accord, *N.L.R.B. v. National Transportation Management Corp.*, — U.S. —, 103 S.Ct. 2469 (1983). This is not a case where Respondent admits an improper motivation or the court so found. As such it must proceed under either the adverse impact or disparate treatment concept and the purported confusion under *Mt. Healthy, supra,* would not apply.

B. The Court's allocation of the burden of proof is not in conflict with other federal decisions, nor does it present an important question of federal law which has not been settled by this Court.

ECOA is a Title VII (42 U.S.C. 2000e) derivative statute prohibiting, in a lending sense, those factors Title VII prohibits in employment with the addition of marital status. As such, the procedure and allocation of burdens is clear, plaintiff must first present a prima facie case of discrimination in accord with *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973); then the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its act, *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), which the plaintiff must then prove is pretextual. In this vein, the burden of proving pretext and the ultimate burden of persuading the trier of fact the defendant is guilty of discrimination remains at all times with the plaintiff, *Texas Department of Community Affairs v. Burdine, supra.* The ultimate determination as to the legitimacy of a defendant's proffered reason for its act is one of fact for determination by the trial court which should not treat the question of discrimi-

nation differently from other ultimate questions of fact, *U.S. Postal Service Bd. of Governors v. Akins,* 455 U.S. 1015 (1982).

Since Petitioners alleged intentional discrimination under a disparate treatment theory in their Complaint (A-12a, 13a), the court properly allocated to them the burden of proving they were otherwise qualified for a loan with a combined income-to-debt ratio of 47% at two separate junctures below. First, in proving they were otherwise qualified borrowers as part of their prima facie case, *McDonnell-Douglas Corp. v. Green, supra;* and second, to show the articulated reasons were pretextual. *Texas Department of Community Affairs v. Burdine, supra.* The Court held Petitioners did neither since they failed to present "(A)ny evidence to establish" the criteria used by Respondent in granting the special category of loans in the 47% income-to-debt ratio bracket (A-9a).

The second theory of discrimination, adverse impact, determines the discriminatory effect of a neutral policy on members of a protected class. While Petitioners did not present evidence on this point, Respondent did. Through the expert testimony of Dr. Lorain Hite, Respondent demonstrated the acceptance rate for married co-applicants on loans during the relevant time frame was 76.93% of all those who had filed, while the acceptance ratio for unmarried female co-applicants in the same period was 77.78% as indicated by the testimony of Dr. Hite attached to this brief from the Record of the trial below as Appendix (App. 1).

CONCLUSION

The Petition for Writ of Common Law Certiorari should be denied because the court below properly charged Petitioners with the burden of proving they were otherwise qualified for a loan with an income-to-debt ratio of 47%; there is ample federal precedent under disparate treatment, adverse impact, and dual motive to guide inferior courts in the application of ECOA; and the decision of the court below is not inconsistent with existing federal precedent.

Respectfully submitted,

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APPENDIX

* * *

(p. 407) Q. What about the Continental Can case?

A. The Continental Can case was testimony in regard to linear revision applied to determining figures and costs for a plant to be shut down.

It was the evaluation of any particular use of linear revisions for determining figure costs.

Q. You testified on those points?

A. Yes.

MR. BRECKENRIDGE: Your Honor, at this time we would move to qualify Mr. Hite as an expert witness in the area of statistics and analyses.

THE COURT: Mr. Felos.

MR. FELOS: No objection, your Honor.

THE COURT: Is it Hite, H-i-t-e?

THE WITNESS: Yes, Hite.

THE COURT: Dr. Hite will be received as an expert in the field of statistics and statistical analyses.

Q. Did you perform any statistical analysis for the defendant in this case?

A. Yes.

Q. Where did you do your work?

A. The statistical work?

Q. Yes.

A. In our office.

* * *

(p. 420) Q. What does this chart depict, Dr. Hite?

A. It depicts a percentage of loan approvals for the three categories of applicants—four categories. I'm sorry.

On the left you have male/female marrieds.

Q. Under the left is a blue chart or a blue bar, and an arrow that points to a category entitled male/female marrieds.

A. Right.

Q. What is the acceptance rate for male/female marrieds?

A. 76.93 percent.

Q. In other words, 76.93 percent of all married applicants were accepted by the association under this procedure.

A. Right.

Q. Moving one step to the right there is a black bar and a black arrow pointing to the category entitled both male.

What does that category depict?

A. The same thing, 75 percent loan applications accepted.

Q. What is that category?

A. Both male.

Q. Two males?

(p. 421) A. Two males.

Q. Applying for a loan of what kind?

A. Applying for a loan.

Q. Jointly applying for a loan together?

A. Yes, in all cases.

Q. What is the acceptance ratio of two men applying for a loan together jointly from Gulf Federal?

A. 75 percent.

Q. That chart then shows that of all applications received from two men applying for a single loan, the association accepted those loans at the rate of 75 percent.

A. Exactly.

Q. The next category is unmarried and marked by a red bar and an arrow, and it's entitled both female.

What is in this category?

A. Two female applicants.

Q. Applying for a single loan?

A. Applying for a single loan.

Q. What does the bar in that category represent?

A. It represents the percentage of approvals, which in this case is 77 to 78 percent.

Q. You have the number 77.78 percent on the chart.

A. That is in decimals.

Q. Then the chart would indicate that of all female co-applicants for a single loan submitted to Gulf Federal, (p. 422) they approved 77.78 percent of those applications where both applicants were female.

A. That's true.

Q. And what is the last category?

There is no bar under it. It's entitled male/female.

A. That is male/female unmarrieds.

Q. A man and a woman not married to each other applying?

A. Right.

Q. Joint applicants for a loan?

A. Joint applicants for a loan.

Q. What is the bar over that category? What does that represent?

A. It represents again, the percentage of loan approvals for this group, which is 88.89 percent. About 89.

Q. And again, of all the applications received by males and females who were unmarried applying for a single loan, Gulf Federal approved 88 percent of them.

A. Right; correct.

Q. What timeframe does Defendant's Exhibit 8 cover?

A. The same timeframe.

Q. The same timeframe?

A. January of '76 to January of '79.

Q. Looking at the chart it appears that two female co-applicants applying for a long (sic) are accepted at a higher rate than married co-applicants; is that correct?

(p. 423) A. Yes.

Q. It also appears that two females applying for a loan from Gulf Federal are approved at a lower rate than two males applying for a loan.

A. That's true.

Q. The females being 77 and the males being 75.

A. That's correct.

Q. Are you familiar with the case of Griggs vs. Duke Power Company?

A. Yes.

Q. Are you familiar with the statistical analysis that has been developed in that case?

A. Yes, sir.

Q. Have you been called on to make an analysis of defendant's approved loan applications in light of the Griggs' case?

A. Yes.

Q. Are you familiar with the 4/5ths rule?

A. Yes.

Q. Would you tell the Court what the 4/5ths rule is—Strike that.

Is the 4/5ths rule related to Griggs' statistical analysis?

A. Yes.

Q. Tell the Court what the 4/5ths rule is.